Supreme Court, U.S.
FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

DOUGLAS OAKES,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE STATE OF INDIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Indiana has a compelling interest in preventing the sexual abuse and exploitation of children. Indiana's criminal code contains a statute (Ind. Code Section 35-42-4-4) which makes it a crime to photograph nude children under sixteen years of age with the intent to arouse the sexual desires of any person. Photographs of nude children may also fall within the definition of obscenity under Indiana law. *See* Ind. Code Sections 35-49-1-10(3) and 35-49-2-1.

The decision by this Court in this case may affect the ability of the State of Indiana to prevent the sexual abuse and exploitation of Indiana children.

SUMMARY OF THE ARGUMENT

The Massachusetts statute in question is a narrowly drawn statute which validly proscribes the posing or exhibition of children in a state of nudity. The States have a valid and compelling interest in proscribing such activity. The statute in question will not chill any real or reasonably foreseeable exercise of the rights of free speech; the statute will hopefully chill the exploitation and abuse of children.

ARGUMENT

The Massachusetts law is clearly addressed to the valid and worthwhile goal of preventing the abuse and exploitation of children. The Respondent asserts that the Massachusetts law is overbroad and, because of the overbreadth, will impermissibly chill the exercise of free speech. Contrary to the assertions of the Respondent, however, the Massachusetts law proscribes a narrow set of activities: No person may encourage or permit a child to pose or be exhibited in a state of nudity. The statute does not prohibit the photographing of pre-pubertal children unless the genitals or pubic area is exposed. The statute does not prohibit the depiction of nudity if the depiction is intended for scientific, medical, educational or cultural purposes.

The only activity possibly "chilled" by the Massachusetts statute is the posing or exhibition of nude children. That is a valid and, indeed, laudable exercise of the powers of the State.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607.

New York v. Ferber, 458 U.S. 747, 756 (1982).

New York v. Ferber, 458 U.S. 747 (1982) was this Court's first examination of a statute prohibiting depictions of sexual

activity involving children. The Court recognized that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." But, the Court held, "the States are entitled to greater leeway in the regulation of pornographic depictions of children." 458 U.S. at 756.

In *Ferber* this Court recognized the severity of the problem posed by the exploitation of children, and the Court declined to second-guess the State's approach to solving the problem. The *Ferber* Court assumed that the laws prohibiting the employment of children in pornographic photographs were constitutional 458 U.S. at 762. Under *Ferber* a person may be convicted of engaging in child pornography even if the photographs do not appeal to the prurient interest of the average person and even if the photographs do not portray sexual conduct in a patently offensive way. 458 U.S. at 764.

This Court will not look for "every conceivable situation which might possibly arise in the application of complex and comprehensive litigation" in order to strike down a statute as overbroad. *U.S. v. Raines*, 362 U.S. 17, 21 (1960). While the First Amendment overbreadth cases are an exception to the general rule, the overbreadth doctrine should be applied only as a last resort. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

A statute which may be validly applied to a substantial number of situations should not be struck down because of hypothetical, marginal applications. *See Parker v. Levy*, 417 U.S. 733, 760 (1974).

In most cases which involve obscenity, public indecency or child pornography, the defendants assert that a statute, if applied in an unreasonable manner, will chill someone's right to free speech. It is likely that a hypothetical situation can be constructed for any criminal statute which would "prove" that the criminal statute "chills" free speech.

This Court, in recent cases, has adopted a rational and responsible approach to the overbreadth doctrine. *See*

especially, Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172 (1986). The Supreme Judicial Court for the Commonwealth of Massachusetts has mis-read and mis-applied the case precedents of this Court. Tne court below was incorrectly and improperly concerned with highly unlikely applications of the Massachusetts statute.

CONCLUSION

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed. The Massachusetts statute does not present a real and substantial threat to the exercise of the freedom of speech. The only activity which can reasonably be expected to be "chilled" is the exhibition of children in a state of nudity. The Massachusetts statute is a valid exercise of State power addressing a compelling State interest in safeguarding the physical and psychological well-being of minors.

Respectfully submitted,

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